Affirmed and Opinion Filed May 25, 2016.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-14-01450-CV

PATRICK THOBE, Appellant
V.
THE UNIVERSITY OF TEXAS SOUTHWESTERN MEDICAL CENTER, Appellee

On Appeal from the 44th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-12-14434

MEMORANDUM OPINION

Before Justices Francis, Evans, and Stoddart
Opinion by Justice Stoddart

Patrick Thobe appeals from the trial court's orders granting the plea to the jurisdiction and motions for summary judgment filed by The University of Texas Southwestern Medical Center (UTSW). Thobe sued UTSW under the Whistleblower Act after his employment with UTSW was terminated. *See* TEX. GOV'T CODE ANN. § 554.002. He argues the trial court erred by granting the motions.

A. Background

According to his petition, Thobe was hired by UTSW as a safety specialist. One of his duties was to oversee UTSW's compliance with safety and reporting standards regarding treatment of animals used for medical testing. Thobe alleged UTSW committed several violations of those standards, such as unauthorized surgeries and procedures on animals, surgeries without pain medication, use of expired anesthetics, allowing live animals to freeze to

death in the carcass freezer, and subjecting caged animals to excessive heat. Thobe initially reported these concerns to his supervisor and then to the Office of Institutional Compliance. Thobe was also a member of the Institutional Animal Care and Use Committee (IACUC) at UTSW. Thobe and another IACUC member, Donna Pulkrabek, raised the issue at a meeting of the IACUC, but the committee members decided there was no merit to the complaints.

Two days later, Thobe and Pulkrabek raised their complaint to the Dean of Basic Research, the highest ranking UTSW official in charge of animal research. Six weeks later, after receiving no resolution to their complaints, Thobe and Pulkrabek raised them with the Office of Laboratory Animal Welfare (OLAW), an office within the National Institutes of Health (NIH).

Thobe was asked to step down from the IACUC about a month after reporting his concerns to OLAW. Three months later, UTSW terminated his employment, citing inappropriate use of his workplace computer and divulging confidential information. Thobe believed these reasons were merely a pretext for UTSW's retaliation against him for reporting the mistreatment of animals.

Thobe filed suit under the Whistleblower Act alleging UTSW, as a governmental entity, retaliated against him for making a good faith report of UTSW's violation of the law to OLAW. He alleged that UTSW failed to comply with federal requirements for humane treatment of animals in medical research and cited the Health Research Extension Act of 1985, public law no. 99-158. Thobe further alleged that OLAW was tasked with enforcing those requirements and that it promulgated additional requirements regarding the treatment of animals in medical research.

UTSW answered and raised its governmental immunity and several affirmative defenses. After the discovery deadline, UTSW filed a plea to the jurisdiction and a no-evidence motion for summary judgment arguing Thobe failed to establish a claim under the Whistleblower Act necessary to waive governmental immunity. *See* TEX. GOV'T CODE ANN. § 554.0035 (public

employee who alleges violation of the Whistleblower Act may sue the employing governmental entity). UTSW also filed a traditional motion for summary judgment challenging the causation necessary for a whistleblower claim. The trial court signed orders granting the plea to the jurisdiction and both motions for summary judgment on the same day. Each order dismissed the case without prejudice.

B. Standard of Review

Governmental immunity from suit is jurisdictional and properly raised by a plea to the jurisdiction. *See State v. Lueck*, 290 S.W.3d 876, 880–81 (Tex. 2009). Lack of subject matter jurisdiction may also be raised by a motion for summary judgment. *Lueck*, 290 S.W.3d at 884; *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000). Section 554.0035 of the Whistleblower Act waives governmental immunity when a public employee properly alleges a violation of the Act. TEX. GOV'T CODE ANN. § 554.0035. Thus, the elements of a whistleblower claim under section 554.002(a) are jurisdictional facts necessary to determine whether a plaintiff has alleged a violation of the Whistleblower Act. *Lueck*, 290 S.W.3d at 881.

A plea to the jurisdiction is a dilatory plea that challenges the trial court's subject matter jurisdiction. *Heckman v. Williamson Cnty.*, 369 S.W.3d 137, 149 (Tex. 2012); *Blue*, 34 S.W.3d at 554. Whether a court has subject matter jurisdiction is a question of law that we review de novo. *Frost Nat'l Bank v. Fernandez*, 315 S.W.3d 494, 502 (Tex. 2010). The plea to the jurisdiction standard generally mirrors that of a traditional motion for summary judgment. *See Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 228 (Tex. 2004). The plaintiff has the burden to affirmatively demonstrate the trial court has subject matter jurisdiction. *Heckman*, 369 S.W.3d at 150; *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 446 (Tex. 1993). While we begin our analysis with the live pleadings, we may also consider evidence relevant to the jurisdictional inquiry and must consider such evidence when it is necessary to resolve the jurisdictional issue. *Heckman*, 369 S.W.3d at 150.

We review the trial court's summary judgment de novo. *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 215 (Tex. 2003). We apply the well-established standards for reviewing summary judgments. *See* Tex. R. Civ. P. 166a(c), (i); *Timpte Indus., Inc. v. Gish*, 286 S.W.3d 306, 310–11 (Tex. 2009) (no-evidence summary judgment standards of review); *Nixon v. Mr. Property Mgmt. Co.*, 690 S.W.2d 546, 548–49 (Tex. 1985) (traditional summary judgment standards of review). If the trial court's order does not specify the grounds for granting summary judgment, we must affirm the summary judgment if any of the theories presented to the trial court and preserved for appellate review are meritorious. *Knott*, 128 S.W.3d at 216.

C. Analysis

UTSW is a governmental entity entitled to immunity from suit unless that immunity is waived. *See* TEX. EDUC. CODE ANN. § 65.02(a)(7); *Univ. of Tex. Sw. Med. Ctr. at Dallas v. Loutzenhiser*, 140 S.W.3d 351, 354 n.5 (Tex. 2004), *superseded by statute on other grounds*, TEX. GOV'T CODE ANN. § 311.034. UTSW raised immunity in both the plea to the jurisdiction and the no-evidence motion for summary judgment. Thobe's first and third issues address the trial court's rulings on the plea and the motion. We address these issues together.

The Whistleblower Act protects "a public employee who in good faith reports a violation of law by the employing governmental entity or another public employee to an appropriate law enforcement authority." TEX. GOV'T CODE ANN. § 554.002(a). An appropriate law-enforcement authority is:

> a part of a state or local governmental entity or of the federal government that the employee in good faith believes is authorized to:
>
> (1) regulate under or enforce the law alleged to be violated in the report; or
>
> (2) investigate or prosecute a violation of criminal law.

Id. § 554.002(b).

To be in "good faith," an employee's belief about the reported-to authority's powers must be "reasonable in light of the employee's training and experience." *Tex. Dep't of Transp. v.*

Needham, 82 S.W.3d 314, 321 (Tex. 2002). An authority's power to discipline its own or investigate internally does not support an employee's good-faith belief that the authority is an appropriate law-enforcement authority. *Univ. of Tex. Sw. Med. Ctr. v. Gentilello*, 398 S.W.3d 680, 686 (Tex. 2013). Instead, the authority must have outward-looking powers. "[I]t must have authority to enforce, investigate, or prosecute violations of law against third parties outside of the entity itself, or it must have authority to promulgate regulations governing the conduct of such third parties." *Id.* Under the Act, the authority's power to "regulate under" or "enforce" must pertain to "the law alleged to be violated in the report." TEX. GOV'T CODE § 554.002(b)(1).

The specific law the claimant alleges was violated is critical to the trial court's determination whether the report was made to an appropriate law-enforcement authority. *Mullins v. Dallas Indep. Sch. Dist.*, 357 S.W.3d 182, 188 (Tex. App.—Dallas 2012, pet. denied) (citing *Needham*, 82 S.W.3d at 320). The report must concern a violation of law by the governmental agency or another public employee. TEX. GOV'T CODE ANN. § 554.002(a). The Whistleblower Act defines "law" as a state or federal statute, an ordinance of a local governmental entity, or "a rule adopted under a statute or ordinance." TEX. GOV'T CODE ANN. § 554.001(1). The claimant's report need not identify the statute, ordinance, or rule he believes was violated. *Wilson v. Dallas Indep. Sch. Dist.*, 376 S.W.3d 319, 327 (Tex. App.—Dallas 2012, no pet.) (citing *Mullins*, 357 S.W.3d at 188). However, during the litigation the claimant must make that identification. *Wilson*, 376 S.W.3d at 327.

In 1985, Congress enacted the Health Research Extension Act of 1985 (HREA). *See* Pub. L. No. 99-158, 99 Stat. 820 (codified in part at 42 U.S.C. §§ 281–289g). Section 495 of HREA, dealing with animal research, is codified at 42 U.S.C. § 289d. Section 289d(a) requires the Secretary of Health and Human Services, acting through the Director of the National Institutes of Health, to establish guidelines for the proper care and treatment of animals used in biomedical and behavioral research and for the organization and operation of animal care committees. 42

U.S.C. § 289d(a). If the Director of NIH determines that the conditions at a research entity receiving a grant, contract, or cooperative agreement do not meet the applicable guidelines, and the entity fails to take action to correct the conditions after notice and a reasonable opportunity to take such action, the Director must suspend or revoke the grant or contract. *Id*. § 289d(d).

Thobe argues OLAW was an appropriate law-enforcement authority because it was tasked with enforcing federal requirements for treatment of animals. Although Thobe cited the HREA in his petition to support this contention, that statute does not identify OLAW or its enforcement or regulatory powers, if any. *See* HREA, Pub. L. No. 99-158, 99 Stat. 820. HREA grants authority to the Secretary of HHS, acting through the Director of NIH, to establish guidelines and authorizes the Director to revoke grants or contracts for failure to meet those guidelines. *See* 42 U.S.C. § 289d(a), (d). The only other support for the contention that OLAW derives its authority from the HREA are conclusory statements in Thobe's and Pulkrabek's affidavits. *See Wilson*, 376 S.W.3d at 326 (conclusory statements are not competent evidence in plea to the jurisdiction proceeding).

On appeal, Thobe relies extensively on Public Health Service (PHS) Policy on Humane Care and Use of Laboratory Animals (Policy). The record does not show, and the parties have not briefed, how this policy was adopted or what relationship it has to the authority of the Secretary of HHS, acting through the Director of NIH, to adopt guidelines under the terms of 42 U.S.C. § 289d. The record from the trial court does not contain a copy of the Policy and it does not appear that it was ever presented to the trial court. This Policy is not a state or federal statute and nothing in the record shows the Policy is equivalent to a "rule adopted under a statute or ordinance." TEX. GOV'T CODE ANN. § 554.001(1); *see Univ. of Houston v. Barth*, 403 S.W.3d 851, 855 (Tex. 2013) (per curiam) (holding university's administrative policies were not "law" under Whistleblower Act "because there is no evidence that the policies were enacted by the Board of Regents as required by the University's enabling statute").

The record does not show that OLAW has authority to regulate under or enforce the law allegedly violated, HREA. As the supreme court recognized in *Gentilello*, "only the United States Secretary of Health and Human Services (HHS Secretary) can 'regulate under' or 'enforce' Medicare/Medicaid rules." 398 S.W.3d at 685. Similarly, the HREA requires, "The [HHS] Secretary, acting through the Director of NIH, shall establish guidelines . . ." regarding proper care and treatment of animals used in biomedical research and for the organization and operation of animal care committees. *See* 42 U.S.C. § 289d(a). Thobe has not shown that OLAW—as opposed to the "[HHS] Secretary, acting through the Director of NIH"—has the authority to enforce, investigate, or prosecute violations of the law against third parties or the authority to promulgate regulations governing the conduct of such third parties. *See Gentilello*, 398 S.W.3d at 686.

Although Thobe may have subjectively believed the Policy was a law and that OLAW is an appropriate law-enforcement authority, that belief must be objectively reasonable. *See Barth*, 403 S.W.3d at 856–57. Thobe is protected by the Whistleblower Act only if "a reasonably prudent employee in similar circumstances would have believed the governmental entity to which he reported a violation of law was an appropriate law-enforcement authority." *Tex. Dep't of Human Servs. v. Okoli*, 440 S.W.3d 611, 614 (Tex. 2014). The terms of the Policy identify it as a policy, not a law. It begins, "It is the Policy of the Public Health Service (PHS) to require institutions to establish and maintain proper measures to ensure the appropriate care and use of all animals involved in research . . . ." Further, the text of the HREA does not mention OLAW nor authorize it to regulate or enforce any portion of the HREA regarding the treatment of animals in medical research. Under the terms of the statute, the Director of NIH, not OLAW, has the authority to suspend or revoke a grant or contract for failure to comply with the guidelines. *See* 42 U.S.C. § 289d(d). Even if Thobe believed that OLAW would forward his report to the Director of NIH, that would not constitute an objective good-faith belief that

OLAW was an appropriate law-enforcement authority. *See Okoli*, 440 S.W.3d at 615 (internal reports insufficient even where agency policy is to forward reports to agency enforcement arm); *Barth*, 403 S.W.3d at 858.

We conclude on this record the Policy is not a law as defined by the Whistleblower Act and that OLAW is not an appropriate law-enforcement authority for purposes of that act. Thobe did not make a good faith report of a violation of law to an appropriate law-enforcement authority. Accordingly, UTSW's governmental immunity was not waived under government code section 554.0035 and the trial court lacked subject matter jurisdiction. The court correctly dismissed Thobe's whistleblower claim.

D. Conclusion

We overrule Thobe's first and third issues. We need not address his second issue regarding the traditional motion for summary judgment. TEX. R. APP. P. 47.1. We affirm the trial court's orders granting UTSW'S plea to the jurisdiction and no-evidence motion for summary judgment.

/Craig Stoddart/
CRAIG STODDART
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

PATRICK THOBE, Appellant

No. 05-14-01450-CV V.

THE UNIVERSITY OF TEXAS SOUTHWESTERN MEDICAL CENTER, Appellee

On Appeal from the 44th Judicial District Court, Dallas County, Texas
Trial Court Cause No. DC-12-14434.
Opinion delivered by Justice Stoddart.
Justices Francis and Evans participating.

In accordance with this Court's opinion of this date, the trial court's October 24, 2014 Order Granting Defendant's Plea to the Jurisdiction and No-Evidence Motion for Summary Judgment is **AFFIRMED**.

It is **ORDERED** that appellee The University Of Texas Southwestern Medical Center recover its costs of this appeal from appellant Patrick Thobe.

Judgment entered this 25th day of May, 2016.